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# A Rawlsian Perspective on Justice for the Disabled

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# Essays in Philosophy

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## *A Rawlsian Perspective on Justice for the Disabled*

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*Abstract:* I aim to identify and describe some basic elements of a Rawlsian approach that may help us to think conscientiously about how, from the standpoint of justice, we should treat the disabled. Rawls has been criticized for largely ignoring issues of this sort. These criticisms lose their appeal, I suggest, when we distinguish between a Rawlsian standpoint and the limited project Rawls mainly undertakes in *A Theory of Justice*. There his explicit aim is to find principles of justice, which are to govern the basic structures of a closed, well-ordered society that exists under reasonably favorable conditions, that would be chosen by parties in the original position from among a small set of traditional conceptions of justice. Once we develop a conception of justice for a society like that, Rawlsians hope we can make certain revisions to find principles of justice for a society like ours. Finally, I sketch what seems to me a plausible way for a Rawlsian to begin thinking about how a society like ours should provide justice for its disabled citizens.

**1. Introduction** Giving a complete account of what we owe the disabled requires an examination of a wide variety of empirical facts along with adequate resolutions to deep and persistent problems in moral and political theory.<sup>1</sup> Rather than attempting this larger project, I intend to focus on a more limited question: How can a Rawlsian perspective, appropriately interpreted and qualified, handle issues of justice for people with disabilities?<sup>2</sup> More specifically, I want to identify and describe some basic elements of a Rawlsian approach that may help us to think conscientiously about how, from the standpoint of justice, we should treat the disabled. My primary aim is not to defend the Rawlsian point of view as a political perspective or as an interpretation of Rawls; rather, I am attempting to assess whether a Rawlsian framework can offer any reasonable and intuitively compelling ways to approach issues of justice for the disabled.

There are a number of good reasons for investigating this question. For one thing, as a matter of historical interest, understanding how a Rawlsian might deal with issues raised by people with disabilities may help us better to understand Rawls' own views. Second, those (rather like me) who are sympathetic to a Rawlsian perspective and interested in developing it in its most plausible form must somehow come to terms with our obligations of justice towards the disabled. Working to incorporate their interests in to a Rawlsian framework may suggest features of it that need to be adjusted and supplemented. Third, examining how well a Rawlsian perspective can accommodate the disabled is essential to an overall assessment of that approach, as compared to other political perspectives. Finally, problems raised by the status and claims of people with disabilities are persistent in ordinary moral and political discussions, so clarifying a reasonable standpoint from which to examine these issues may be of broad public interest.

Rawls has been criticized for largely ignoring these sorts of issues, which is worrisome for his view because denying that certain people with disabilities are owed justice clearly offends our reasonable intuitions. The ideas of the circumstances of justice, society as a fair system of cooperation, and the original position are thought to be particularly problematic on this count. While I think these objections are misplaced, a better criticism of Rawls' view, it seems to me, is that members of the ideal society for which principles of justice are initially chosen must be "normal and fully cooperating member[s] of society over a complete life," suggesting that his view does not count many people with disabilities as subjects of justice.<sup>3</sup> This criticism loses its appeal, however, when we distinguish between a Rawlsian standpoint and the limited project Rawls mainly undertakes in *A Theory of Justice*.<sup>4</sup> There his explicit aim is to find principles of justice, which are to govern the basic structures of a closed, well-ordered society that exists under reasonably favorable conditions, that would be chosen by parties in the original position from among a small set of traditional conceptions of justice.<sup>5</sup> Once we develop an appropriate conception of justice for a society like that, Rawlsians hope that we can make certain revisions, qualifications and additions to the theory to then find principles of justice for a more realistic society. Most of Rawls' work can be understood as taking a few initial steps towards finding a comprehensive theory of justice for a society like ours.<sup>6</sup> As we will see, though, Rawls makes some sketchy remarks about how his perspective might be used to approach issues of justice for people with disabilities.

My discussion is structured as follows. In the second section I briefly describe a Rawlsian perspective and distinguish it from Rawls' limited project of justice. In the next three sections I argue that, suitably interpreted, Rawls' notions of the circumstances of justice, society as a fair system of cooperation, and the original position raise no special problems for people with disabilities. In the sixth section I argue that the ideal society for which principles of justice are initially chosen does not include people with certain types of mental disabilities, though it includes more disabled people than we might expect. In the final section, I sketch what seems to me a plausible way for a Rawlsian to begin thinking about how a society like ours should provide justice for its disabled citizens.

## 2. A Rawlsian Political Perspective

Here are a few basic elements of a Rawlsian political perspective.

(1) The primary task of political philosophy, according to Rawls, is to find principles of justice. These principles are supposed to specify fair terms of cooperation to govern the basic social, political and economic institutions of society.<sup>7</sup> A public conception of justice can be thought of as a society's public charter, directing how basic rights and liberties, along with the benefits and burdens of social life, are to be distributed among its citizens.

(2) A society's political conception of justice is to be understood as the object of a hypothetical agreement among free and rational persons in an initial situation of equality, which Rawls calls the original position. Subject to a qualification I will introduce later, the original position can be described as follows. It consists of free and equal people<sup>8</sup> who are rational<sup>9</sup> and mutually disinterested.<sup>10</sup> They are presumed to know basic facts about social life, but none of them knows anything about her particular natural or social endowments.<sup>11</sup> The so-called veil of ignorance, which

excludes information of this sort, is a feature of the original position that reflects the basic Rawlsian theme that no one should be advantaged or disadvantaged in the choice of principles of justice by natural or social contingencies. Each person in the original position is also assumed to want for himself as much of the so-called primary goods as possible.<sup>12</sup> Primary goods, which are goods that people want regardless of what else they want and include rights, liberties, income, wealth and self-respect, tend to increase the likelihood that a person will succeed in advancing her ends.<sup>13</sup> This feature of the original position defines the motivations of the parties, who are ignorant of their own particular ends, but nonetheless want to put themselves in the best position to pursue whatever plan of life they happen to have.<sup>14</sup>

(3) The Rawlsian approach endorses a particular way of justifying principles of justice, which is to find a sort of coherence among our considered moral judgments and a public conception of justice. We are to regard our most basic convictions about justice, for example that slavery as it was practiced in the American South is wrong, as provisional fixed points and attempt to work out principles of justice that explain the judgments that, on reflection, we find we cannot give up. By sometimes abandoning certain considered judgments and sometimes altering the principles of justice meant to capture them, we work to achieve a kind of coherence among these, a state which Rawls calls reflective equilibrium.<sup>15</sup>

(4) The last point to notice is about how are we to set out finding principles of justice that we can affirm on due reflection. For Rawlsians, a useful technique is to limit a question to a manageable set of issues that can be approached relatively systematically, and then use our findings to try to resolve more complicated problems. Rawls employs this procedure by explicitly limiting the project he undertakes in *A Theory of Justice*. What I will call *Rawls' limited project of justice* is to find principles of justice, which are to govern the basic structures of a closed, well-ordered society that exists under reasonably favorable conditions, that would be chosen by parties in the original position from among a small set of traditional conceptions of justice.<sup>16</sup> For purposes of this project, Rawls restricts what issues he will address in several ways. First, he does not discuss the justice of non-basic institutions, justice between nations, retributive justice, and the doctrine of just war. Second, he assumes that parties in the original position are choosing a conception of justice from among a short list of traditional conceptions, including utilitarianism and perfectionism, rather than from among a complete set of all possible such conceptions.<sup>17</sup> Third, Rawls largely leaves aside issues having to do with the duties and obligations of individuals, except as these directly relate to just institutions. Fourth, he makes several idealizing assumptions about the ideal society for which parties in the original position are to select principles of justice. In particular, he assumes that it consists only of people who accept, and know the others accept, the same principles of justice and who are "normal and fully cooperating member[s] of society over a complete life." He also stipulates that the basic institutions of this society are effectively regulated by that same conception of justice, which means that injustice in an ideal society of this sort is almost (if not fully) absent.<sup>18</sup>

All of this idealization is meant to define a relatively tractable task that, if successful, can hopefully be used to approach more complicated and urgent issues of justice. This means that, even if Rawls' limited project is successful, we cannot yet draw conclusions about how we should resolve pressing issues of justice that arise in our own society, in which many of us are not normal and fully cooperating members.<sup>19</sup> We know from the start that the limited project will be incomplete so we

should not criticize it for failing to address cases for which it was not designed to cover. Our aim should be to decide whether Rawls' theory of justice and the Rawlsian perspective in general can be put to good use when attempting to approach more complicated issues of justice.

It should be emphasized that this method of idealization should not be taken to suggest or imply, as some have thought, that the issues of justice addressed by the limited project are more fundamental or pressing than other political issues.<sup>20</sup> Martha Nussbaum, for example, says:

But the postponement is not innocent, clearly. The parties are being asked to imagine themselves as if they represent citizens who really are 'fully cooperating . . . over a complete life,' and thus as if citizens have no needs for care in times of extreme dependency. This fiction obliterates much that characterizes human life, and obliterates, as well, the continuity between the so-called normal and people with lifelong impairments...More generally, care for children, elderly people, and people with mental and physical disabilities is a major part of the work that needs to be done in any society, and in most societies it is a source of great injustice. Any theory of justice needs to think about the problem from the beginning, in the design of the basic institutional structure, and particularly in its theory of the primary goods.<sup>21</sup>

And Eva Kittay says that:

[Rawls'] idealization is seriously misleading...[It puts] too much distance between the "normal functioning individual" and the person with special needs and disabilities. Not a single citizen approaches the ideal of full functioning *throughout* a lifetime. The idealization, in contrast, suggests that those who are not fully functioning are relatively few, and that consequences of special needs is brokered only in monetary terms.<sup>22</sup>

There is no necessary connection, however, between the sequence in which a Rawlsian addresses a set of moral issues and the relative importance or priority of those issues in her final theory. There are three reasons for this. First, since Rawlsians are aiming in the long run for reflective equilibrium between our considered moral convictions and a conception of justice for our own society, the sequence in which we address particular political issues will presumably have no bearing on the final outcome. Even if, however, different starting points do not lead to the same conception of justice in reflective equilibrium, this does not mean that any of those starting points is more basic than the others.<sup>23</sup> Second, it is clear that the limited project sets aside what most of us would regard as fundamental and important issues of justice, including those having to do with punishment, warfare, other nations, and non-basic institutions. Indeed, the limited project does not even address obligations and duties that may be even more important than the requirements of justice themselves. Third, rather than resting content with the conception of justice for Rawls' ideal society, the Rawlsian perspective directs us to supplement and qualify the limited project when we set out to find principles of justice for a society like ours.

### 3. The Circumstances of Justice

Society, according to Rawls, is a "cooperative venture for mutual advantage," which is characterized by an identify of interests, since a cooperative scheme is better for each member of

society than no scheme at all, and a conflict of interest, since citizens are not indifferent to how the benefits of social cooperation are to be distributed among them.<sup>24</sup> The circumstances of justice can be understood as the most minimal conditions for a system of this sort to be possible and necessary. When these conditions obtain in a society, cooperative social arrangements can exist there and these arrangements are needed for each member of society to lead a minimally tolerable life. Hume, whose account of the circumstances of justice Rawls largely follows, was similarly interested in defining the conditions in which an ‘artifice’ of justice (understood mainly as a system that protects the use and transfer of property) could exist in a society and be useful to its members.<sup>25</sup> By specifying the background conditions that make systems of social cooperation possible and necessary, the circumstances of justice help to define the role that the concept of justice is supposed to play in that society, which is to specify how the benefits of that system are to be distributed.<sup>26</sup>

The circumstances of justice pick out a set of societies that have the following features. They each include a sufficiently large group of moderately selfish people who are roughly equal in physical and mental ability and who live together at the same time in the same definite territory under conditions of moderate scarcity of resources. These people are also assumed to have a capacity for a conception of the good and suffer minor limitations in their cognitive abilities.<sup>27</sup> In addition, Rawls emphasizes in *Political Liberalism* that members of society, or at least members of democratic societies, will inevitably affirm different and irreconcilable moral, religious and philosophical doctrines.<sup>28</sup>

Several philosophers have worried that Rawls’ account of the circumstances of justice implies that people who fail to satisfy these conditions, many of whom are disabled, do not count as subjects of justice, even though we think from a pretheoretic point of view that many of them are owed justice. Martha Nussbaum for example says:

[Rawls’] description [of the circumstances of justice] excludes people whose mental and physical powers are very unequal to those of ‘normal human beings’; for related reasons, it seems bound to exclude nations, and their inhabitants, whose powers and resources are very unequal to those of the dominant nation or nations; finally, and obviously, it excludes nonhuman animals. Theorists in the tradition are aware of these omissions. They simply judge that the omissions are not a major problem for the theories at the stage where basic principles are being chosen.<sup>29</sup>

If we address this worry to my interpretation of the circumstances of justice, it amounts to the claim that societies containing certain people with disabilities do not, for that reason, exist under the circumstances of justice. Since, on my view, these conditions are ones that must obtain in order for a system of social cooperation to be possible and necessary in a society, the objection holds that a system of social cooperation must be impossible or unneeded in a society containing people with certain kinds of disabilities. Put this way, however, the objection does not succeed. Such schemes can certainly obtain in societies where people with even severe disabilities exist, since their very presence alone does not eliminate the possibility or usefulness of social cooperation. We readily see this in our own societies—these schemes exist and benefit everyone even though some of us are disabled. A system of social cooperation can be successful in a society, for example, that contains a few people with Down’s syndrome or a few people who are quadriplegics. As long as these systems

can exist and make each citizen better off than she would be if she were to try to get by solely on her own efforts, the society exists under the circumstances of justice, so principles of justice are needed to divide the benefits of cooperation for that society. Rawls clearly seems to believe this since he claims that all modern democratic societies, including those with disabled citizens, exist under the circumstances of justice.<sup>30</sup> In order for a society to satisfy the circumstances of justice, therefore, we need not assume that it is maximally efficient or that everyone who takes part in the system of cooperation is non-disabled or makes a positive contribution to the overall surplus.

Two of the conditions that Rawls counts as circumstances of justice may give a different impression than this. I'll discuss them in turn.

### *Equality Condition*

In order for issues of justice to arise in a society, Rawls claims that its members must be "roughly similar in physical and mental powers."<sup>31</sup> This equality condition may be interpreted strongly or weakly depending on the degree to which it requires members of a society to be similar in their abilities. If they must be very similar in these respects, as some philosophers have thought, this condition may suggest that justice does not apply to those people with disabilities who fall outside of that narrow range of abilities.<sup>32</sup> There are good textual and philosophical reasons to think, however, that Rawls does not subscribe to this strong reading and that, understood properly, the equality condition does not exclude nearly *any* sort of disabled person from being a subject of justice.

(1) The first thing to note is that the circumstances of justice are not meant to pick out which members of a particular society are owed justice. Rather, these conditions have to do with the background circumstances in which a social system of cooperation *as a whole* can succeed. As long as the circumstances of justice obtain, however, they leave as a substantive political issue which people in that society are owed justice.

(2) If the equality condition is interpreted strongly then it does not qualify as a circumstance of justice anyway since social cooperation is clearly possible and necessary in societies in which some people have physical and mental powers that are not very similar to the average members of their society. The equality condition can be satisfied by societies that include people with all sorts of disabilities, since there is no reason to think that the presence of these people makes a *system* of social cooperation there impossible or unnecessary.

(3) What kind of people, if they existed in a society, would make a system of social cooperation impossible or unnecessary for that group? Rawls offers one answer to this when he immediately clarifies the equality condition by saying "or at any rate, their capacities are comparable in that no one among them can dominate the rest."<sup>33</sup> This suggests that Rawls is most concerned with the consequences of having people in a society who have such *exceptional* physical and mental abilities that their plans cannot be blocked even by the united efforts of all other members. Since a system of social cooperation seems impossible in a society of this sort, it seems reasonable to hold that questions of justice do not arise for that group.

Are there any sort of disabled people the mere presence of which would make social cooperation in



a society impossible or unnecessary? The only plausible way this might happen would be if a society devoted extraordinary resources to its severely disabled members and this caused the social system itself to collapse. If this were to happen, however, the best explanation for why justice would no longer apply would be that the society no longer had enough resources for issues of justice to apply. Even in this scenario, the presence of profoundly disabled members does not in itself eliminate the possibility of social cooperation. Moreover, the circumstances of justice leave as an open question whether *justice* actually requires society to engage in such radical redistributions of resources, so the presence of these people may be thought to make just social cooperation there impossible. Principles of justice for less ideal societies, however, might include exception clauses that do not require society to perform actions that undermine otherwise just institutions. And, like people with such exceptional abilities that their plans cannot be blocked by the combined efforts of others, however, these disabled people are extremely rare. In any case, we should interpret the equality condition weakly as saying that members of society fall within a very broad range of physical and mental abilities, with this range assumed to include virtually all people with disabilities.

(5) No part of Rawls' limited project, or the Rawlsian perspective for that matter, depends on the strict condition of equality.

(6) In addition, even if Rawls' limited project does assume that justice applies only in societies where citizens fall within a relatively strict range of physical and mental ability, since nothing essential depends on this assumption, we should change that feature of Rawls' view when trying to find principles of justice for a society more like ours.

### *Plan of life condition*

The test for whether a claim counts as a circumstance of justice is whether social cooperation can be possible and necessary in societies in which that claim does not hold. Rawls insists that the circumstances of justice include the condition that members have their own plans of life, or conceptions of the good.<sup>34</sup> This plan of life condition guarantees that members of society have different goals and ends that lead them to make conflicting demands on the resources of society, thereby making social cooperation necessary as a means to resolve those disputes. Since some people with disabilities do not have a conception of the good or even a capacity for one, this condition may suggest that these people are not owed justice.

The plan of life condition admits of two interpretations, however, depending on its scope. The strong reading requires each and every member of society to have a conception of the good while the weak one requires most citizens to have a plan of life. We should prefer the weaker reading, which does not exclude people with disabilities from being subjects of justice.

(1) The plan of life condition is supposed to be a necessary condition for a system of social cooperation can succeed in a society. In societies in which social cooperative arrangements are possible and necessary, questions about which of its citizens are owed justice must be addressed by a substantive conception of justice.

(2) The strong interpretation of the plan of life condition, which requires all members of society to have a conception of the good, is not a circumstance of justice because systems of social



cooperation can be mutually beneficial when some members of society lack a conception of the good. As long as a sufficient number of people make conflicting demands on the natural and social resources of society, and the other circumstances of justice obtain, social cooperation can be mutually beneficial.

(3) As a matter of textual interpretation, Rawls thinks that societies existing under the circumstances of justice can include citizens who lack a conception of the good. He thinks, for example, that just societies must make provisions for the appropriate care of children, many of whom do not yet have a conception of the good, along with people who might lose their conception of the good through injury or accident.<sup>35</sup>

(4) Rawls' limited project and the Rawlsian perspective do not presuppose the strong interpretation, whereas it seems plausible to assume that issues of justice arise only in societies in which *enough* of its members have a plan of life that causes them to make demands on a social system of cooperation.

(5) Finally, if Rawls stipulates that justice applies only in societies in which all members have a conception of the good, we should clearly change this inessential feature of his view when trying to find principles of justice for a more realistic society.

#### 4. Society as a Fair System of Cooperation

Characterizing society as a cooperative venture for mutual advantage may suggest that certain disabled people are not owed justice since they are not full participants in the overall cooperative scheme. In particular, requiring basic cooperative arrangements to be mutually advantageous suggests that a person can take part in that system only if her overall contribution to the cooperative surplus is or would be positive. This means that people who do not satisfy this condition, many of whom are disabled, do not count as parties to the cooperative venture for mutual advantage. It may seem that since these people are not part of society, as Rawls understands it, they are not owed justice. Nussbaum, for example, says:

To include in the initial situation people who are unusually expensive or who can be expected to contribute far less than most to the well-being of the group...would run contrary to the logic of the whole exercise. If people are making a cooperative arrangement for mutual advantage, they will want to get together with those from cooperation with whom they may expect to gain, not those who will demand un-usual and expensive attention without contributing anything much to the social product, thus depressing the level of society's well-being.<sup>36</sup>

Eva Kittay similarly claims:

It would surely be unreasonable to expect those so disabled that they are permanently dependent to similarly reciprocate care or in any relevant sense "restrict their liberty in ways necessary to yield advantages to all" (Rawls 1972, 112). They would then fall outside the bounds of social cooperation, and in *Political Liberalism* Rawls seems willing to deny these persons *citizen-ship* (Kittay's emphasis).<sup>37</sup>

This challenge rests on a misinterpretation of how Rawls uses the concept of mutual advantage. An arrangement is mutually advantageous for a group of people just in case each of them is better off than he would be under some alternative arrangement (or under no arrangement at all). When Rawls characterizes society as a cooperative venture for mutual advantage, he means that social cooperation makes each member of society better off than she would be *if there were no system of social cooperation*. He supposes that a society consists of people who recognize and often act in accordance with particular rules of conduct that “specify a system of cooperation designed to advance the good of those taking part in it.”<sup>38</sup> Rawls says:

Thus, as I noted at the outset, although a society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as an identity of interests. There is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to try to live solely by his own efforts.<sup>39</sup>

Moreover, when he tries to defend the difference principle, he calls it a principle of mutual benefit since “the more advantaged, when they view the matter from a general perspective, recognize that the well-being of each depends on a scheme of social cooperation without which no one could have a satisfactory life.”<sup>40</sup> And, Rawls argues that the principle of utility would not be chosen in the original position since it may violate the principle of mutual benefit, by requiring some people to make extreme sacrifices in order to benefit others.<sup>41</sup>

Membership in society, for Rawls, does not depend on one’s ability to provide a positive contribution to the cooperative surplus.<sup>42</sup> Instead, Rawls is beginning with a basic idea of society that he thinks can be found in our democratic traditions.<sup>43</sup> He makes this clear when he further elaborates the idea of society as “a fair system of cooperation over time, from one generation to the next.”<sup>44</sup> Citizens of a society, Rawls says, do not regard their social order as “a fixed natural order, or as an institutional hierarchy justified by religious or aristocratic values” but rather think of it as a system that at the very least makes each person better off than she would be in a “state of nature” in which no system of social cooperation exists. The requirement that the social arrangements of society must be mutually advantageous therefore raises no special problems for people with disabilities. In addition, a social order counts as a society only if it makes all of its members, including its disabled ones, better off than if no such arrangement existed.

How does this interpretation square with Rawls’ claim that the idea of society as a fair system of cooperation over time involves the principle of reciprocity, according to which everyone who engages in cooperation in accordance with the rules and procedures of their society should receive appropriate benefits, as specified by a conception of justice?<sup>45</sup> Henry Richardson for example worries:

Yet the ability [to cooperate as free and equal citizens] seems essential for Rawls’s most fundamental idea of distributive justice to apply, namely the idea of reciprocal benefit... To address the claims of the severely disabled within the category of justice, some adjustment to the basic orienting ideas is clearly needed.<sup>46</sup>

The principle of reciprocity requires that each person who takes part in the system of social cooperation, by acting in accordance with its rules and procedures, should receive a fair share of

social benefits. This does not imply, however, that a society must consist *only* of people who are full participants in the scheme of social cooperation. Fully cooperating people can receive their fair share of the social surplus even when others around them have not fully participated, and even when these people receive some of the benefits of social cooperation themselves. Indeed Rawls says that children and people who have suffered severe accidents can be members of a society even though they are not full cooperators.<sup>47</sup>

## 5. The Original Position

Nussbaum objects to Rawls' idea of the original position on the grounds that it gives the same answer to the questions "By whom are society's basic principles designed?" and "For whom are society's basic principles designed?"<sup>48</sup> As she interprets Rawls, the parties in the original position are assumed to be the same as the members of the society for which principles are to be chosen.<sup>49</sup> This raises serious problems for Rawls' theory, according to her, because of the restrictions Rawls places on who can participate in the original position. She thinks these conditions restrict membership in the original position and in the group for whom principles of justice are chosen, since as she reads Rawls, these groups are the same. Nussbaum finds three of these conditions particularly troubling. According to her, parties in the original position are assumed to be: (1) free in the sense that "nobody owns anyone else, nobody is the slave of anyone else;"<sup>50</sup> (2) equal in that their physical and mental abilities are roughly similar;<sup>51</sup> and (3) independent in that they are all fully cooperating members of society.<sup>52</sup> Depending on how strongly we interpret these conditions, it may turn out that many people with disabilities are excluded from participating in the original position. If Nussbaum is right, these people would also be excluded from the group for whom principles of justice are chosen.<sup>53</sup> Since parties in the original position are assumed to want as much of the primary goods for themselves as possible, she thinks they will choose principles that are mainly designed to protect their own interests, rather than those of the members of society who lack the requisite abilities to participate in the original position.<sup>54</sup> Nussbaum worries that excluding certain people from the group for whom principles of justice are being chosen may "affect the fully equal treatment of such citizens."<sup>55</sup> She also objects that such exclusions mean that Rawls' view does not, in the first instance, address crucial issues of social justice, including ones about "allocation of care, the labor involved in caring, and the social costs of promoting the fuller inclusion of disabled citizens."<sup>56</sup>

In response, it is important to distinguish between the characteristics of the hypothetical parties in the original position and the characteristics of the actual or hypothetical citizens in the society for which principles of justice are to be chosen. Rawls' suggestion is roughly that principles of justice are those that *would be* chosen by free and equal persons under fair circumstances. The original position is a purely hypothetical device in which the choice of principles is derived by analysis and deductive reasoning from the conditions of that situation.<sup>57</sup> The way in which we characterize the original position, including the moral status, motivations and knowledge of the parties, is meant to specify a situation that we, on reflection, regard as appropriate for choosing such principles. There is no presumption, therefore, that the characteristics of the parties in the original position must be the same as the features of the citizens for whom principles are being chosen. Indeed, we would normally expect them to be quite different, especially when choosing principles of justice for less ideal societies.

Rawls makes this quite clear in *Political Liberalism* and *Justice as Fairness* when he explicitly assumes that the parties to the original position are *representatives* of the members of that society—each person in the original position is to act as a trustee for a citizen.<sup>58</sup> This means that the parties in the original position and the citizens of society are not necessarily the same, so we are free to place restrictions on the sort of people who can participate in the original position without also placing the same restrictions on the group for whom principles are to be chosen. Even if Nussbaum is correct that many people with physical and mental disabilities cannot participate in the original position, this does exclude such people from the group for whom principles of justice are to be chosen.

Nevertheless, it may be a significant flaw of Rawls' theory if, as Nussbaum assumes, it prevents certain people with physical and mental disabilities who are fully capable of political choice from choosing fundamental principles of justice.<sup>59</sup> Of course, this worry would be graver if the original position were meant as an *actual* situation for designing the social arrangements of a real society, since failing to include these people would count as a form of unjustified discrimination. But, as Nussbaum argues, excluding certain types of people from a hypothetical choice situation in which there is no good reason for their exclusion may fail to treat actual people of that type as fully equal persons.<sup>60</sup>

In order to assess this further worry, we must consider in more detail how Rawls characterizes the parties in the original position. Nussbaum is correct that, according to Rawls, parties in the original position are free, equal and independent. As she interprets him, however, the parties must have these features because they exist under the circumstances of justice, which she takes to imply that the parties are not dominated by anyone else (free), roughly equal in physical and mental ability (equal), and fully cooperating members of society (independent).<sup>61</sup> Nussbaum argues that certain people with disabilities, who are fully capable of participating in political choice, do not meet these conditions, so they are excluded from the original position.

Setting aside the issue of whether these features are actually circumstances of justice, if my interpretation of that notion is correct, it plays a different role in Rawls' theory than the one Nussbaum supposes. The circumstances of justice specify the conditions a *society* must meet in order for issues of justice to arise there. Once these conditions are met, citizens are then faced with the difficult task of designing fair social arrangements to distribute the benefits of social cooperation. The original position is a hypothetical device that allows us to model a fair choice situation among free and equal persons. When the basic institutions of society satisfy these principles, its citizens can “say to one another that they are cooperating on terms to which they would agree if they were free and equal persons whose relations with respect to one another were fair.”<sup>62</sup> In no place does Rawls say that the parties in the original position exist under the circumstances of justice. Nor should he, at least if some of them are interpreted as Nussbaum suggests. There is no reason why the idea of a fair agreement among free and equal persons should be restricted to persons who are roughly equal in physical and mental ability or to persons who are fully cooperating members of society. On reflection, these conditions seem incompatible with a fair choice situation for choosing principles of justice.<sup>63</sup>

How does Rawls understand the notions of ‘free’, ‘equal’, and ‘independent’ as he applies them to

the parties in the original position? (1) These people are free in the sense that they are able and have sufficient reason to press claims on each other with regard to choosing the principles that will govern the basic structures of society.<sup>64</sup> (2) Parties to the original position are also equal—they “all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance, and so on.”<sup>65</sup> (3) Parties are independent in the sense that they are mutually disinterested—they are not concerned with each other’s interests. Many people with physical and mental disabilities satisfy these minimal conditions. And for the ones that do not, we may think, on reflection, that it is appropriate not to include them in the initial choice situation, especially if they are included in the group for whom principles of justice are to be chosen.

## 6. The Limited Society

The basic Rawlsian ideas we have discussed so far, those of the circumstances of justice, society as a fair system of cooperation, and the original position, raise no special problems for people with disabilities. I now want to discuss a feature of Rawls’ limited project that explicitly sets aside concerns about some disabled people.

Rawls’ limited project is to find the principles of political justice to govern the basic structures of a closed, well-ordered society under reasonably favorable conditions that would be chosen in the original position among a few traditional conceptions of justice. Parties in the original position are thus choosing principles for a particular sort of ideal society, which I will call the limited society. Here are some of its features. (1) The limited society exists under the circumstances of justice, and (2) it is closed. (3) The limited society is well-ordered, which means that citizens strictly comply with their political conception of justice.<sup>66</sup> That is, all members of society accept the same principles of justice; the basic structures of society for the most part satisfy these principles; and all members of society have a normally effective sense of justice that normally causes them to understand and act from their society’s political conception of justice.<sup>67</sup> (4) Rawls also assumes that each person in the limited society is “a normal and fully cooperating member of society over a complete life.”<sup>68</sup> According to Rawls, this last condition means that each limited citizen exists under the circumstances of justice and also possesses and normally exercises two basic moral powers—a capacity for a sense of justice and a capacity for a conception of the good.<sup>69</sup> I’ll discuss these characteristics in turn.

Limited citizens have a capacity for a sense of justice, which is the ability to “understand, apply and act from the principles of political justice that specify the fair terms of social cooperation.”<sup>70</sup> They are able to acquire a willingness to abide by fair terms of cooperation that others can reasonably accept.<sup>71</sup> Limited citizens also have a capacity to form, revise and rationally pursue a conception of their good.<sup>72</sup> For Rawls, a person’s good is determined by “what is for him the most rational plan of life given reasonably favorable circumstances.”<sup>73</sup> A person’s conception of the good is usually a set of final ends that the person aims to pursue for their own sake. These ends specify what the person regards as ultimately valuable and worthwhile in life.<sup>74</sup> According to Rawls, a person rationally pursues a conception of the good rational if she possesses coherent preferences that cause her to rank her available options by how well they serve her final ends and she follows the plan that is more likely to satisfy more rather than less of these ends.<sup>75</sup>

In addition to having these two moral powers, limited citizens actually possess a sense of justice. They normally understand, apply and act from principles of justice—each person has “a strong and normally effective desire to act as the principles of justice require.”<sup>76</sup> Since we are assuming that the political conception of justice of a limited society will be strictly complied with, its citizens are presumed to have a sense of justice that normally causes them to adhere to those principles. When institutions are adjusted in light of new social circumstances, the public sense of justice also acts a stabilizing force to ensure that social arrangements remain just.<sup>77</sup> And, limited citizens normally exercise their capacity for a conception of the good—they are “rational and able to manage their own affairs.”<sup>78</sup> At any given time, according to Rawls, limited citizens have a “determinate conception of the good that they try to achieve.”<sup>79</sup> Limited citizens exist under the circumstances of justice, so cooperation among them is possible and beneficial. In these conditions, each person pursuing her conception of the good makes cooperation among them mutually beneficial, but this also causes disagreement about how the benefits of cooperation should be distributed. Principles of justice are therefore needed to specify fair terms of cooperation.

What types of people does the limited society exclude? Severely cognitively impaired people I will understand to be those who permanently or temporarily lack the capacity for a sense of justice or a capacity for a conception of the good. This group includes, for example, people who are in persistent vegetative states. Moderately cognitively impaired people I define as those who possess both moral powers but who do not normally exercise them. Along with people with certain moderate cognitive disabilities, many people we do not typically think of as impaired fall in to this group, including young children, sociopaths, and repeat criminals.<sup>80</sup> Since people who belong to these groups are not ‘normally and fully cooperating members’ in Rawls’ sense, they are not members of the limited society.

Notice, however, that the limited society includes people whose disabilities do not prevent them from possessing or normally exercising their moral powers. Limited citizens, for example, can have hearing, visual, mobility and cognitive impairments that we normally think of as giving rise to disabilities. For the purposes of Rawls’ limited project, parties in the original position do not know whether the citizens they represent will have these disabilities, so they will want to choose principles of justice that insure against this possibility. And it seems reasonable to say that, in this context, Rawls’ two principles of justice do a better job than other traditional conceptions of justice at protecting the interests of the limited citizens who are disabled.

What about the interests of radically and moderately cognitively impaired people, which are not addressed by the limited project? Rawls is well aware that the limited project needs to be supplemented in various ways to account for our obligations of justice towards them. He says:

[W]e do not mean to say, of course, that no one ever suffers from illness and accident; such misfortunes are to be expected in the ordinary course of life, and provision for these contingencies must be made. But given our aim, I put aside for the time being these temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense.<sup>81</sup>

## 7. Conclusion: Principles of Paternalism



In this section I want to sketch briefly what seems to me a promising way for Rawlsians to begin addressing issues of justice for the severely disabled.

The limited project assumes that parties in the original position know they are choosing principles of justice for a society consisting of people who are all fully cooperating citizens. Once we relax this assumption, and suppose that the parties know they are choosing principles of justice for a society that also includes radically and moderately cognitively impaired people, there is good reason for them to choose principles of justice that protect the interests of all people with disabilities. The veil of ignorance is meant to prevent the parties from knowing how well their constituents fare in the natural and social lotteries, so it seems reasonable that they should also be ignorant of whether their beneficiaries are disabled. They also know that accident or misfortune may cause otherwise fully cooperating members to suffer, permanently or temporarily, impairments of various sorts.<sup>82</sup> The parties will thus want to secure as much of the primary goods for their beneficiaries as possible, and so choose principles of justice that provide appropriate rights, liberties, income, wealth and self-respect to the disabled.

Specific questions about what sort of care and treatment society must provide for people with disabilities, Rawls thinks, are appropriately addressed at a later stage of his theory, where the two principles of justice are applied to the institutions of a particular society.<sup>83</sup> Each stage represents an appropriate standpoint for addressing certain kinds of questions. At the legislative stage, participants are supposed to assess the justice and constitutionality of laws and policies. Like members of the original position, they are still assumed to be ignorant of particular facts about themselves; but these people now know all relevant general economic and social facts about their society.<sup>84</sup> From this perspective, Rawls thinks that ideal legislators will have enough information about the prevalence of certain types of severe disabilities along with the costs of accommodating them to work out some appropriate policies and procedures for caring for people with severe disabilities.

While people in the original position may plausibly leave such public policy issues for a later stage of the theory, the parties must face fundamental issues of justice raised by the possibility of people whose moral powers are absent or so impaired that they are unable to rationally pursue their interests, make decisions about their own good, or resist irrational inclinations that, if left unchecked, would cause them to act very foolishly. In particular, when is it permissible for society to make decisions on our behalf, especially when doing so requires overriding one of our present choices?<sup>85</sup> Parties in the original position know that their beneficiaries may be so incapacitated that they will be unable to make rational decisions about their own medical treatment, living arrangements, education and so on. As a matter of basic justice, Rawls thinks that parties in the original position will want to ensure that people who are unable to care for themselves are nonetheless treated appropriately. In addition to choosing principles that secure basic rights and liberties, along with adequate income and wealth, therefore, he thinks the parties choose principles of paternalism, which are principles that “the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society.”<sup>86</sup> Even though Rawls does not say much about which specific principles of paternalism would be chosen, he suggests that, from the standpoint of the original position, it is reasonable to restrict these principles in the following ways.

(1) The principles should be aimed at protecting the integrity of citizens. “Pater-nalistic principles,”



Rawls says, “are a protection against our own irrationality, and must not be interpreted to license assaults on one's convictions and character by any means so long as these offer the prospect of securing consent later on.”<sup>87</sup> Society, therefore, should not prevent a fully cooperating member of society from sometimes acting on his foolish impulses, since this would constitute a fundamental assault on the person's integrity and autonomy. But since the parties in the legislative stage, for example, know that such imprudent impulses exist, they may decide on laws that permit the establishment of schemes of penalties and incentives that would encourage people to refrain from acting on such irrational inclinations.<sup>88</sup> In more severe cases, however, when a person has lost his ability to look after his own good, decisions about his treatment, care, way of life, etc. will have to be made on his behalf. Parties in the original position will want to ensure that these decisions are respectful and reflect as far as possible the person's most deeply held convictions (if any). Principles of paternalism would most likely require, for example, that severely disabled people are treated with dignity and respect, and that they are afforded adequate opportunities to exercise their capabilities.

(2) These principles must license only paternalistic interventions in which we “choose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally,” where rationality for Rawls is to be understood as effectively pursuing one's ends.<sup>89</sup> In other words, our decisions on behalf of a person must be such that, if he were to regain his powers and exercise them appropriately, he would agree with us that we did the best thing for him given the circumstances.<sup>90</sup> Principles of paternalism must therefore be guided by the principles of justice along with our knowledge of “the subject's more permanent aims and preferences, or by the account of primary goods.”<sup>91</sup> If we lack a great deal of knowledge about how he would in a given case, we should choose for him as he would decide in the original position.<sup>92</sup> The basic idea is that in choosing these principles, parties in the original position do not necessarily want to force severely cognitively impaired people to live the same life as ‘normal’ people; rather, it seems plausible from the perspective of the original position that in situations in which a person is unable to manage her own affairs, the best we can do for her from the standpoint of justice is to help her lead a life that we reasonably think she would choose for herself were she thinking clearly.<sup>93</sup>

(3) Paternalistic decisions are justified only in cases in which it is clear that a person lacks the two moral powers. Rawls says that “paternalistic intervention must be justified by the evident failure or absence of reason and will.”<sup>94</sup> A person who merely acts irrationally on various occasions, therefore, is not necessarily subject to principles of paternalism. These principles come in to effect only when it is readily apparent that we are unable to manage our own affairs. People with moderate cognitive disabilities, therefore, who do not rationally pursue their conception of the good will not be required by these principles to live as someone else dictates. But a person who is wholly incapable of doing what is best for himself can be legitimately forced to comply with the principles, provided that the decisions made for him are those that we reasonably think he would make for himself were he to develop or regain his powers.<sup>95</sup>

Paternalistic principles of this sort must be spelled out in greater detail before Rawls' proposal can be fully assessed. What I have tried to show is that his view provides some resources to approach important issues of justice for people with severe mental disabilities. As we move beyond Rawls' ideal and limited project, and begin to think about principles of justice for a society more like ours,

the Rawlsian perspective directs us to consider how people in the original position would make decisions with the knowledge that their beneficiaries might be disabled. Principles of paternalism of the sort I have described, or principles like them, seem to be a necessary part of a comprehensive conception of justice for a realistic society.

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## Notes>

1. I am grateful to Tom Hill for comments and criticisms along with many valuable conversations about Rawls' work. Thanks also to the Christine James, Guy Kahane, Eva Kittay, participants at a UNC-CH Work in Progress series, and participants at a workshop on disability and moral philosophy held at UNC-CH in September, 2007.

2. References to Rawls' works are symbolized as follows. 'TOJ,' refers to *A Theory of Justice* (Revised Edition). 'PL,' refers to *Political Liberalism*; 'JAF,' refers to *Justice as Fairness: A Restatement*, and 'CP' refers to *Collected Papers*.

3. PL, 18. See also TOJ, 10.

4. The project Rawls primarily pursues in *Political Liberalism* is quite similar to this one, with a

few minor differences, including that Rawls is more concerned in the later work with the fact of reasonable pluralism. In both books, though, he aims to find principles of justice for an ideal, well-ordered society.

5. *TOJ*, 7-8.

6. See *CP*, 332-333 and *PL*, 20-21.

7. *JAF*, 7-8.

8. *TOJ*, 17. Parties are assumed to be free and equal in order to represent them equally as moral persons. See also *TOJ*, 441-449 where Rawls argues that the basis of equality in this sense is that of having the dual capacities for a sense of justice and a conception of the good.

9. *TOJ*, 12. Rationality, for Rawls, is to be interpreted in the narrow sense of having a coherent set of ranked preferences and taking the most effective means to one's ends or giving up the ends. Rawls makes one slight change to the familiar account of rationality from economic theory. At *TOJ*, 124-125 he assumes that the parties in the original position are not envious of each other. He argues in Chapter 7 of *TOJ* that if his theory were to assume a more substantive account of rationality then it runs the risk of circularity, by allowing parties to choose principles of justice on the basis of their prior convictions about justice.

10. *TOJ*, 12. Parties are assumed to be mutually disinterested in order to ensure that the original position is characterized in an uncontroversial way. See also *TOJ*, 221-227 where Rawls argues that the Kantian interpretation of justice as fairness lends additional support to this assumption.

11. See *TOJ*, 17, 118-122.

12. *TOJ*, 54, 123.

13. See *TOJ*, Chapter 7 for a fuller discussion of the account of the good Rawls gives to explain the primary goods.

14. The Rawlsian approach follows a method of pure procedural justice, according to which no independent criterion of justice is assumed to exist; rather, a fair outcome is defined as the product of a fair procedure. Rawls contrasts pure procedural justice with perfect and imperfect procedural justice. A procedure is one of perfect justice when there is an independent criterion for a just outcome and the procedure, if followed correctly, definitely produces the outcome. A procedure is one of imperfect procedural justice when there is an independent criterion of this sort but the procedure, even if followed correctly, does not always produce the outcome. See *TOJ*, 74.

15. *TOJ*, 17-19, 40-44. Rawls distinguishes between narrow and wide reflective equilibrium, with the former being a coherence between our considered moral judgments that survive reflection and principles of justice and the latter being that state once we have reviewed all of the alternative conceptions of justice along with the arguments for them.

16. *TOJ*, 7-8.

17. *TOJ*, 105-109. The rationale for this simplifying device, according to Rawls, has to do with the intellectual powers of the parties in the original position--it is difficult to see how the parties could define all possible conceptions of justice and rank them appropriately.
18. See *TOJ*, 4, 8, *PL*, 18.
19. As I see it, the task of *Political Liberalism* is an attempt to extend the limited project to a society a bit more like ours, in which there is a pluralism of reasonable comprehensive doctrines.
20. See also Hartley, "An Inclusive Contractualism."
21. Nussbaum, *Frontiers*, 127.
22. Kittay, *Love's Labor*, 88.
23. Thanks to Guy Kahane for pressing me on this point.
24. *TOJ*, 4.
25. See *TOJ*, 109 f/n. As a result of sympathetic identification with the public interest, Hume thinks that when these circumstances obtain, being disposed to act justly counts as a virtue because that trait of character would secure approval from the general point of view. For discussions of the circumstances of justice see Treatise 3.2.2 and for discussion of the general point of view see Treatise 3.3.1.
26. *TOJ*, 109, 109 f/n.
27. In particular, Rawls says at *TOJ*, 110 that their "knowledge is necessarily incomplete, their powers of reasoning, memory, and attention are always limited, and their judgment is likely to be distorted by anxiety, bias, and a preoccupation with their own affairs."
28. In other words, the circumstances of justice include the fact of reasonable pluralism. See *PL*, 36, *TOJ*, 110, and *JAF*, 84.
29. Nussbaum, *Frontiers*, 28.
30. *JAF*, 84.
31. *TOJ*, 109-110
32. Nussbaum 28, 31 for example, raises this sort of worry about the circumstances of justice.
33. *TOJ*, 110.
34. *TOJ*, 110.
35. See *TOJ*, 215 218, 405.
36. Nussbaum, *Frontiers*, 104.

37. Kittay, *Love's Labor*, 105.

38. *TOJ*, 4.

39. *TOJ*, 109.

40. *TOJ*, 88.

41. *TOJ*, 13, 447.

42. For further discussions on this point, see Hartley, "Inclusive Contractualism."

43. *PL*, 15; *JAF*, 5.

44. *PL*, 15.

45. *PL*, 16.

46. Richardson, "Rawlsian Theory and the Disabled," 425.

47. Rawls might have changed his view about this. See *JAF*, 5.

48. Nussbaum, *Frontiers*, 16.

49. Nussbaum, *Frontiers*, 16, 58.

50. Nussbaum, *Frontiers*, 28.

51. Nussbaum, *Frontiers*, 28-29.

52. Nussbaum, *Frontiers*, 33.

53. Nussbaum, *Frontiers*, 33 says "One might begin by noting the absence of children and elderly people from the account of the political domain in such theories—and even of adult women, whom most of these thinkers understood as dependents of men (since they did not count work performed in the home as productive work). Even if we assume that those omissions are not a serious problem for the theories, we then notice that such theories make no place for those who for long stretches of a life, or even the whole of a life, are markedly unequal to others in their productive contribution or who live in a condition of asymmetrical dependency. Such people are clearly absent from the contracting group—and, given the conflation I have emphasized, they are *ipso facto* absent from the group of citizens for whom the principles of justice are framed. Their interests might possibly be handled at some later stage. But their needs do not shape the parties' choice of basic political principles, or even their conception of the primary goods of a human life, since they are imagined as contracting for mutual advantage with others similarly placed."

54. Nussbaum, *Frontiers*, 16 acknowledges that the interests of these other people may be protected in other ways. For example, parties may draw on their own sympathies and commitments to accommodate non-contractors. The interests of non-contractors may also be taken in to account

when those principles are further elaborated and developed. Other moral requirements, besides those of justice, may ensure that the interests of non-contractors are safeguarded. But Nussbaum argues that the 'primary subjects of justice' are nonetheless the same as the people who are to choose those principles.

55. Nussbaum, *Frontiers*, 18.

56. Nussbaum, *Frontiers*, 34.

57. *TOJ*, 103.

58. *PL*, 75, 105-106, *JAF*, 84.

59. Nussbaum admits that certain people with severe mental impairments do not have the requisite abilities to participate in a situation of this sort. Failing to include them in the original position, therefore, may not be unjust as long as their interests are somehow protected. See Nussbaum, *Frontiers*, 15.

60. Nussbaum, *Frontiers*, 15.

61. Nussbaum, *Frontiers*, 16, 28-34.

62. *TOJ*, 12. Rawls thinks that citizens in a society of this sort are autonomous in the sense that their terms of cooperation are self-imposed.

63. Nussbaum's notion of freedom, which is not being dominated by anyone else, does however seem to be a necessary requirement for parties in the original position, since we want the principles to be the result of fair agreement among equal moral persons.

64. *TOJ*, 131; *JAF*, 23.

65. *TOJ*, 17.

66. *TOJ*, 125.

67. Rawls discusses this requirement at *TOJ*, 4, 5, 125-126 but explicitly adds this as a condition of a well-ordered society at *JAF*, 9.

68. *PL*, 18, 19. See also *TOJ*, 10, *JAF* 18.

69. *TOJ*, 442, *JAF*, 18-19.

70. *JAF*, 19.

71. *PL*, 49-50.

72. *TOJ*, 123.

73. *TOJ*, 347. A plan of life is rational for a person, according to Rawls, if it is consistent with

principles of rational choice as they are applied to her circumstances and it is in the set of plans that she would choose if she were fully aware of the relevant facts and deliberated carefully. See *TOJ*, 358-359.

74. *PL*, 19.

75. *TOJ*, 123-124. Rawls also assumes that rational individuals are not envious. See *TOJ*, 124-125.

76. *TOJ*, 398.

77. *TOJ*, 6, 154, 401.

78. *TOJ*, 218.

79. *PL*, 19.

80. *PL*, 20.

81. *PL*, 20.

82. *TOJ*, 218-219.

83. *PL*, 184.

84. *TOJ*, 174.

85. *TOJ*, 219.

86. *TOJ*, 219.

87. *TOJ*, 220.

88. *TOJ*, 220.

89. *TOJ*, 183, 219.

90. *TOJ*, 219.

91. *TOJ*, 220.

92. *TOJ*, 219.

93. Thanks to the Issue Editor, Christine James, for pressing me on this point.

94. *TOJ*, 219-220.

95. In some cases it will be difficult in practice to distinguish between people who are severely cognitively impaired, who will be subject to principles of paternalism, and moderately cognitively impaired people, who might not be subject to them. Provisions will certainly need to be made for



borderline cases of this sort, in which it is unclear whether a person is able to look after their own good, and the principles of paternalism may be one part of a unified strategy for giving justice to these people.